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JUL 12 2006

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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JESUS ALEJANDRO HERNANDEZ-GARCIA, aka Jesus Alejandro Garcia, Defendant - Appellant.	No. 05-50336 D.C. No. CR-04-00111-VAP MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted February 15, 2006
Submission deferred February 21, 2006
Resubmitted July 7, 2006
Pasadena, California

Before: CANBY, NOONAN, and KLEINFELD, Circuit Judges.

Jesus Alejandro Hernandez-Garcia appeals his 57-month sentence for his conviction of one count of being an alien found in the United States following

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

deportation. Even though the 57-month sentence is within Hernandez-Garcia's correctly calculated Sentencing Guidelines range, we have jurisdiction to review his challenge that this sentence is unreasonable.[1]

Hernandez-Garcia argues that his sentence is unreasonable because the Guidelines count his prior criminal history against him twice. He is arguing that it was unreasonable for the sentencing judge not to depart downwards because this "double counting" resulted in an "unreasonable" sentencing range. However, we have held that the method of counting used to determine Hernandez-Garcia's sentence is permissible.[2] Moreover, the overall sentence is reasonable. The record before us indicates that Hernandez-Garcia has twice been deported and that on each occasion he quickly re-entered the United States. The record also indicates that Hernandez-Garcia has committed numerous serious criminal offenses while in the United States, including grand theft, attempted burglary, and assault on a police officer with a firearm. On these facts, we do not believe that a sentence of

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[1] United States v. Plouffe, 445 F.3d 1126, 1128 (9th Cir. 2006).

[2] See e.g. U.S. v. Luna-Herrera, 149 F.3d 1054 (9th Cir. 1998) (no error in using "prior conviction as a basis for the sixteen point increase pursuant to [§ 2L1.2] and in calculating [defendant's] criminal history score").

57 months — at the low end of the advisory Guidelines range — gives unreasonable weight to Hernandez-Garcia's prior criminal history.

Hernandez-Garcia next argues that his sentence is unreasonable because the sentencing judge did not consider the eight months he spent in state custody for his parole violation. Hernandez-Garcia's incarceration following his parole revocation was punishment for his earlier state crimes, not his illegal reentry.[3] Therefore the sentencing judge did not abuse her discretion by failing to consider that time to reduce Hernandez-Garcia's federal sentence.

AFFIRMED.

[3] United States v. Brown, 59 F.3d 102, 104 (9th Cir. 1995).